

August 14, 1995

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

IS CITY REQUIRED TO REDISTRICT COUNCIL DISTRICT BOUNDARIES IN
LIGHT OF THE RECENT SUPREME COURT CASE OF MILLER v. JOHNSON?

INTRODUCTION

At the City Council meeting of July 17, 1995, two citizens asked that the City realign City Council District boundaries in light of a case recently decided by the United States Supreme Court, *Miller v. Johnson*, 95 Daily Journal D.A.R. 8495 (U.S. June 29, 1995). One of those citizens threatened to sue the City if the City Council did not commence redistricting immediately. The Council referred the question of whether the City is legally required to commence redistricting immediately in light of the new case to the City Attorney for analysis and opinion. This report is in response to that referral.

The City went through the redistricting process following the 1990 decennial census. Ultimately, in November 1990, a federal district court, pursuant to the federal Voting Rights Act, approved the new council district boundaries. No appeal was taken at that time. Therefore, the federal court's decision is final and cannot be reopened, except by parties to the lawsuit. The City is not required as a legal matter to commence redistricting in light of the recent Supreme Court case of *Miller v. Johnson*.

BACKGROUND

In 1988, several class action plaintiffs sued the City under the Voting Rights Act in federal district court over its council district boundaries. *Perez v. City of San Diego*, No. 88-0103 R(M) (S.D. Cal. Sept. 1990). The case arose before the federal 1990 census data were available. The City's redistricting was conducted over the span of two years and was finalized in November 1990. The case was originally settled in September 1989, which settlement was approved by the federal court. Following allegations that the City had breached the terms of the original settlement agreement, the court reopened the case. After several more court hearings and conferences, the case again settled and, on November 15, 1990, the federal court approved a "Modification to

Settlement Agreement" between the class plaintiffs and City.

Some key features of both the original and modified settlement agreements must be pointed out. First, the modified and original settlement agreements were made in full compliance with then applicable state and federal laws, and court cases governing redistricting. Second, the court approved the redistricted boundaries of the eight council districts, as shown on a map attached to the modified agreement, a reduced version of which is attached to this report. Third, the modified settlement agreement requires the members of plaintiff class to be notified of any proposed redistricting plans that take place between 1990 and the year 2000, so that its members will be afforded an opportunity to be heard in a public forum. Fourth, the federal court retained jurisdiction to supervise the terms of the settlement agreement, including the modified settlement agreement. The federal court, therefore, would probably become involved in any redistricting the City undertakes between now and the year 2000, when the next regularly scheduled redistricting will take place. Lastly, and most significantly, the federal court's order approving the settlement agreement was entered in November 1990, and there was no appeal taken at that time from that district court order. Therefore, the court order is final and binding as to decisions made and approved in that judicial order. The two citizens' complaints about the council district boundaries come almost five full years after the court order was entered.

ANALYSIS

I. Analysis of *Miller v. Johnson*

The two citizens have alleged that the recently decided case of *Miller v. Johnson* requires this City to commence redistricting immediately to comply with its holding. The case does not stand for that proposition. The Court in *Miller v. Johnson* simply held that Georgia's redistricting plan adopted following the 1990 census violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Miller v. Johnson*, 95 Daily Journal D.A.R. 8495 (U.S. June 29, 1995). In contrast with the five-year lapse between entry of the court order approving San Diego's redistricting and the two citizens' complaints about the council district boundaries, the *Miller* case was decided on direct appeal from a federal district court's decision about the Georgia redistricting plan.

The redistricting plan under attack in *Miller* contained three majority-black districts. The plan was adopted only after the U.S. Justice Department exercised its powers under section 5 of the federal Voting Rights Act and refused to preclear earlier plans offered by Georgia's State Legislature that had contained only two black-majority districts. The Supreme Court upheld the District Court's finding that the shape of one black-majority district's irregular borders was

evidence of the State Legislature's purpose in enacting the redistricting plan. Specifically, the Supreme Court upheld the District Court's finding that race was the overriding and predominant force in the redistricting determination. In so holding, the Supreme Court stated that courts must proceed cautiously in adjudicating claims that a state has drawn race-based district lines.

To establish their claim of unconstitutional race-based redistricting, the Miller plaintiffs had a heavy evidentiary burden. As the Supreme Court described it:

The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."

Miller v. Johnson, 95 D.A.R. at 8500, citing Shaw v. Reno, 509 U.S. , 2827 (1993).

The Miller case can best be understood by a brief discussion of Shaw v. Reno, which is a reapportionment case arising out of North Carolina. In Shaw, the Supreme Court held that plaintiffs

asserted a claim under the Equal Protection Clause of the Fourteenth Amendment by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification. If the allegation of racial gerrymandering remains uncontradicted on remand to the district

court, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest.

Reno v. Shaw, 509 U.S. , 125 L. Ed. 2d 511, 536 (1993).

Explaining the *Shaw* holding, the Miller court stated that the shape of one or more districts

is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.

Miller v. Johnson, 95. D.A.R. 8495, 8499.

In other words, just because one or more voting districts are bizarrely shaped does not establish a claim of constitutionally defective boundaries. Even more important, neither the *Miller* case nor the *Shaw* case stands for the proposition that states or cities must commence redistricting in mid-decade and between decennial census results. Rather, the cases merely enunciate the principles to be applied in future redistricting.

II. Applicability of *Miller v. Johnson*: Is this City Required to Redistrict at This Time?

Although the *Miller v. Johnson* case deals with Congressional districts, not City Council districts, the principles enunciated in the case will apply to this City when it commences its next redistricting. However, contrary to the two citizens' assertions at the July 17th City Council meeting, the case does not require the City to commence redistricting at this point. First and foremost, the procedural posture of the *Miller* case is distinguishable from this City's situation, because that case was decided on direct appeal from a federal district court order at the time the redistricting was done in Georgia. In contrast here, the two citizens commenting at the July 17th Council meeting are bringing their complaints five years too late. The time for appeal from the federal district court order approving the settlement agreement in the *Perez* case and the City's redistricted boundaries has long since passed.

Furthermore, assuming only for the sake of argument that the *Miller* case requires the City to commence redistricting immediately, the complaining citizens have alleged and shown nothing to establish a claim under *Miller v. Johnson*, *supra*, or *Shaw v. Reno*, *supra*, that the City's council district boundaries are unconstitutionally defective. Until such time that someone brings forward specific allegations or evidence

of any constitutional defect in the City's council district boundaries, there can be no meaningful legal analysis.

III. Procedure for Redistricting

We repeat that the City is not required to commence redistricting immediately as a legal matter. However, the City Council may choose to do so at any time pursuant to San Diego City Charter section 5. Assuming, again for the sake of argument only, that the City Council were to commence redistricting at this time, the City Attorney must point out applicable charter requirements. Redistricting in the City of San Diego is conducted pursuant to authority and limitations set forth in City Charter sections 5 and 5.1.F

San Diego City Charter section 5.1 did not exist the last time redistricting was conducted in this City. Section 5.1 was adopted by voters in June 1992.

A copy of these Charter sections is attached to this report. In brief, they require redistricting to be conducted by a seven-member Redistricting Commission, whose members are appointed by the Presiding Judge of the Municipal Court.

CONCLUSION

The City went through the redistricting process following the 1990 federal decennial census. A federal district court approved those new council district boundaries. The federal court's decision is final and cannot be reopened, except by parties to the lawsuit.

The recently decided Supreme Court case of *Miller v. Johnson* does not stand for the proposition that the City must commence redistricting immediately. Rather, that case merely enunciates the principles to be applied in future redistricting.

Respectfully submitted,
JOHN W. WITT
City Attorney

CCM:jrl:011(043.1)
Attachments
RC-95-24